

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LANDMARK LEGAL FOUNDATION,

Plaintiff,

vs.

CA No. 12-1726
Washington, DC
March 27, 2014
5:00 p.m.

U.S. ENVIRONMENTAL PROTECTION
AGENCY,

Defendant.

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE ROYCE C. LAMBERTH
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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P R O C E E D I N G S

THE LAW CLERK: Landmark Legal v EPA, Number 12-1726.

THE COURT: I have been wondering what has been going on here because I noticed in the docket that discovery was going to be completed in December and I hadn't heard from you all since then.

MR. FERGENSON: Thank you for your time, Your Honor. Arthur F. Ferguson on behalf of Landmark Legal Foundation, movant, for an order to compel in the deposition of the Former Administrator of the EPA, Lisa P. Jackson. The deposition is today. We thank Ms. Jackson for coming from California to appear, and she's leaving tomorrow.

This Court's ruling will also apply, by necessity, to the deputy administrator, whose deposition also foundered on this same subject matter. I appeared before this Court in the prior action by Landmark against EPA that resulted in the order of contempt issued by this Court concerning the preservation of documents.

As this Court ordered, limited discovery has been ongoing with the cooperation of the government. And Landmark depositions -- this may be the final deposition in the series on two topics. And the Court explained on Page 14 of its August 14th, 2013, order, Document 39, that one of the reasons why this Court was ordering the limited discovery -- and this

1 goes to Item 2 of the limited discovery, whether the EPA
2 initially excluded the administrator, deputy administrator
3 and/or chief of staff from Landmark's FOIA request.

4 And this Court explained the possibility that the
5 agency purposefully excluded the top leaders of the EPA from
6 the search, at least initially, suggests an unreasonable and
7 bad faith reading of Landmark's FOIA request and subsequent
8 agreement to narrow its scope. There is no question, and
9 we've established that the initial e-mail to everyone, but
10 directed toward the FOIA administrators of the administrator
11 and deputy administrator, went out on October 23rd, and no
12 search of the deputy administrator was performed until
13 April 30th. No search of any repository. The deputy
14 administrator, April 30th, well past the election.

15 And with respect to the administrator, no search
16 was conducted for three weeks and a day following the time
17 when the request went to everybody other than to the FOIA
18 responsible officials for the administrator and deputy
19 administrator. So, a three-week delay. And then from October
20 to April 30th for the deputy administrator.

21 Now, that may be enough, but the language that this
22 Court used in ordering the limited discovery suggests to us
23 that we can probe for possible motive as to why this delay
24 occurred. And the Court took into account the
25 inconsistencies, reversal, which undermine confidence in the

1 truthfulness of the briefing and affidavits.

2 We have Exhibits 60, 62, 63, which are independent
3 sources, one is the Washington Post article, Exhibit 60;
4 another is a December 2nd Final Report from the Administrative
5 Conference of the United States; and the third is a speech by
6 Cass Sunstein who headed up OIRA, the office in OMB that was
7 the stopping point for -- green or red light for the issuance
8 of rules, OMB, you have to go through Cass Sunstein.

9 In both the Washington Post story and in the
10 Administrative Conference report there are statements, this is
11 what prompted -- even before these reports -- Landmark to file
12 this, we wanted to know whether the brakes had been put on
13 controversial rulings by EPA before the election. And then we
14 would argue whether it was politically motivated or not. Both
15 of these sources say that it was.

16 And the speech by Sunstein says -- this is
17 Exhibit 63 -- that going through the list in my head of the
18 deputies with whom I worked on these meetings, the approval
19 meetings, Bob Perciasepe, who became the Acting EPA
20 Administrator, he's the Deputy Administrator. He was directed
21 not to answer questions on this topic when we deposed him, and
22 we continued the deposition to determine whether we would go
23 forward, and now the question has been called.

24 Bob Perciasepe who became the Acting EPA
25 Administrator, an agency where he was number two for a long

1 time, several others, and then end with Lisa Jackson at EPA.
2 And another article says that it was Ms. Jackson, this is Lisa
3 Heinzerling, inside EPA, Exhibit 61, that says, the people who
4 had authority to go to EPA, to go to OIRA, and say, please let
5 us issue these rulings, were Ms. Jackson and Mr. Perciasepe.

6 Now, Ms. Jackson has already testified today that
7 most of the meetings with were Mr. Perciasepe. And
8 Mr. Perciasepe testified that he would meet frequently, at
9 least every month or every two months. We have received one
10 document in the production that we can locate, Exhibit 28,
11 highly redacted, that speaks of a meeting in January of 2012
12 and a meeting in July of 2012, our range when we asked for the
13 FOIA request. Everything else is missing.

14 Now, if he was meeting to try to get these rules
15 approved, and the White House was saying, no, wait. If the
16 articles are to be believed, they're political -- you know, we
17 can't do it until after the election. There's a black hole
18 here. We want to find out why there was -- essentially this
19 was not only blocked from initial search, but blocked from the
20 very core search that we sought. And when there's time, we
21 believe that we will present to the Court evidence that the
22 search was done with a production or a responsiveness
23 definition that excluded the very documents that we wanted.

24 We're looking to prove -- to probe -- we think we
25 have the delay. We think there are other reasons why the

1 search was inadequate, not for today, unless the Court wants
2 to know, we want to probe the purposefully issue. There may
3 be bad faith otherwise. The mere fact that there was no
4 search of the deputy, the one most in contact with Cass
5 Sunstein, who is reported to have said: No, no, not until
6 after the election -- is enough. But we want to ask the same
7 questions of the deponent.

8 We have tried, and as we did with Ms. Browner, to
9 treat the deponent respectfully. We are seeking information
10 not to embarrass her. And as this Court noted in its order,
11 Document 39, Ms. Browner, did not do anything wrong, it was
12 the EPA that was held in contempt. We want the information.
13 We don't know why the EPA delayed so long. We have our
14 suspicions. We have our facts. And we want to say: How
15 often did you meet with him? Did you talk about rule making?
16 And then be able to present to this Court this black hole, and
17 the reasons why, based upon sources that you would not expect
18 to be in Landmark's corner, the Washington Post, the New York
19 Times, Administrative Conference, not sources that would
20 naturally be associated with the positions that Landmark
21 generally advocates.

22 So, for those reasons, we want to respectfully move
23 forward to lay the foundation for arguments which we will
24 make, if we can, to this Court, that maybe there's a reason
25 why they did what they did. Even without it we're entitled to

1 relief, and what they did was wrong. But this may color it
2 and this is discovery. We want to find it out.

3 We do not think that this has gone beyond the scope
4 of this Court's number two, as explained by this Court. And I
5 don't think, respectfully, that that gloss, that the
6 underlying reason can be ignored.

7 THE COURT: All right.

8 MR. FERGENSON: Thank you, Your Honor.

9 MS. GRAHAM-OLIVER: Good afternoon, Your Honor.
10 Your Honor, I initially made --

11 THE COURT: Let me get your name and the names of
12 the people with you.

13 MS. GRAHAM-OLIVER: Excuse me?

14 THE COURT: Let me have your name and the names
15 with you?

16 MS. GRAHAM-OLIVER: Certainly, I'm sorry. My name
17 is Heather Graham-Oliver, I'm an Assistant U.S. Attorney and I
18 represent the EPA in this matter. I also have with me Karen
19 Bennett, who is agency counsel for EPA, and Kevin Miller, who
20 is also agency counsel for EPA.

21 THE COURT: Okay. Bennett, you said?

22 MS. GRAHAM-OLIVER: Miller. Bennett.

23 THE COURT: Bennett was first?

24 MS. GRAHAM-OLIVER: Yes, sorry.

25 THE COURT: And Miller. Okay. And Mr. Coburn is

1 representing the deponent?

2 MR. COBURN: Yes, Your Honor.

3 THE COURT: Okay. Go ahead.

4 MS. GRAHAM-OLIVER: Yes, Your Honor. Your Honor,
5 as you know, on August the 14th of 2013 you issued a
6 Memorandum Opinion. And in that Memorandum Opinion you
7 indicated that Landmark could indeed conduct discovery limited
8 to the following questions. And the first question was
9 whether and to what extent the EPA administrator, the deputy
10 administrator and/or chief of staff used personal e-mail
11 accounts to conduct official business during the relevant time
12 period.

13 Certainly, the Government has no objection to any
14 and all questions pertaining to the relevant persons here, use
15 of personal e-mail accounts, and in addition, the plaintiffs
16 were not obstructed or the Government did not object to
17 questions pertaining to Instant Messaging, questions
18 pertaining to text messages. And all of that has been
19 inquired into with respect to the deputy administrator and the
20 EPA administrator.

21 Secondly, the other issue is whether the EPA
22 initially excluded the administrator, deputy administrator
23 and/or chief of staff from Landmark's FOIA request. I don't
24 know if you recall, you probably do, that there was an issue
25 initially as to whether or not the FOIA request landed with

1 the administrator and the deputy administrator, and there were
2 issues as far as the dates because there was initial requests
3 by the name of Jonathan Newton. He sends out an e-mail
4 request to program offices in the EPA in October 23, 2012.

5 And then there was an -- there is an e-mail dated
6 November 14, 2012, which indicates that he's sending out the
7 FOIA request to the administrator and the deputy
8 administrator. We had not included that initial -- that
9 November 14th, 2012 e-mail to our motion for summary judgment.
10 So, that did provide a problem for the Court.

11 As the Court -- we tried to explain to the Court
12 that there are FOIA coordinators in program offices, and that
13 Aaron Dickerson was the FOIA coordinator for the Office of the
14 Administrator. So, the FOIA request landed with the Office of
15 the Administrator with Mr. Dickerson. However, he did not
16 send it on to the relevant persons until November 14th, 2012,
17 and at that point both the administrator's office and the
18 deputy administrator's office got the FOIA request. So, I
19 just wanted to clarify that issue.

20 THE COURT: Both what -- I didn't hear it.

21 MS. GRAHAM-OLIVER: Received the FOIA request for
22 the search.

23 THE COURT: In November?

24 MS. GRAHAM-OLIVER: In November 14, 2012, yes, he
25 sent the FOIA request to Aaron Dickerson, who is special

1 assistant to the administrator, and an individual named
2 Nena -- Nena Shaw, who is the one who is responsible to do the
3 search for the deputy administrator.

4 So, we are proceeding with the depositions in
5 accordance with these two questions that were very relevant to
6 the Court in its decision in terms of whether or not a proper
7 search was conducted.

8 THE COURT: Well, on the second question then, what
9 you're representing is that it's true that the administrator
10 and deputy administrator were excluded from the initial
11 farming out of the request, right?

12 MS. GRAHAM-OLIVER: No, they were not excluded,
13 Your Honor, because --

14 THE COURT: They weren't included. However you
15 want to word it.

16 MS. GRAHAM-OLIVER: No, actually what happens when
17 the FOIA requests comes into the EPA, it goes to a particular
18 office, and then this office decides who is going to take
19 charge of that FOIA request. It came to the administrator's
20 office. So, there was no question that it was within the
21 administrator's office. And then it got distributed to the
22 administrator herself, as well as the deputy administrator and
23 the chief of staff.

24 THE COURT: At the same time it was forwarded to
25 others? I thought what you just said was it was --

1 MS. GRAHAM-OLIVER: Yeah, it's a little bit
2 confusing. There are FOIA coordinators --

3 THE COURT: The wording I had in my order was
4 "initially excluded."

5 MS. GRAHAM-OLIVER: Right.

6 THE COURT: Are you quibbling with the wording or
7 were they initially excluded?

8 MS. GRAHAM-OLIVER: No, I'm saying that they were
9 not initially excluded.

10 THE COURT: But it wasn't sent to them?

11 MS. GRAHAM-OLIVER: I'm saying that it was sent to
12 the administrator's office, although the administrator's
13 office was --

14 THE COURT: By the requester?

15 MS. GRAHAM-OLIVER: No. No. It was sent initially
16 to the EPA by the requester. The EPA then determined which
17 office it should go to, because there are a lot of program
18 offices --

19 THE COURT: Okay. So, who decided that?

20 MS. GRAHAM-OLIVER: I believe it was the Office
21 of -- the FOIA office, the general FOIA office, yes.

22 THE COURT: And when did they decide that?

23 MS. GRAHAM-OLIVER: I'm not sure when they decided
24 that. August 29th.

25 THE COURT: August 29th?

1 MS. GRAHAM-OLIVER: Yes.

2 THE COURT: But then it didn't go to the
3 administrator and the deputy until some time in November?

4 MS. GRAHAM-OLIVER: It went to -- it actually went
5 to the FOIA coordinator for the administrator's office prior
6 to November. It may have been even prior to October 23rd.

7 THE COURT: Okay. But not on August 29th?

8 MS. GRAHAM-OLIVER: Correct.

9 THE COURT: So, if I was talking about, in this
10 order, which is as I recall I was, they initially excluded the
11 administrator -- the initial action was on August 29th and it
12 did exclude the administrator and the deputy, right?

13 MS. GRAHAM-OLIVER: No.

14 THE COURT: Okay.

15 MS. GRAHAM-OLIVER: So, the initial request was
16 received by the EPA on August the 20th, 2012. On August
17 the 21st, 2012, the EPA's national FOIA office acknowledged
18 the receipt of the request. Then the request was assigned to
19 the Office of the Executive -- to the Executive Office after
20 August 21st. So, the Office of the Secretariat received the
21 request after the FOIA office received it. And the Office of
22 the Secretariat received the request or was notified on
23 August 29th that the EPA's national FOIA officer sent a letter
24 to plaintiff granting the request for a fee waiver.

25 So, the Office of -- it's call OEX -- was notified

1 on August the 29th that EPA's national FOIA office had granted
2 the request for a fee waiver. Jonathan Newton is in the OEX
3 office. So, they received the request on August 29th.

4 Jonathan Newton is a FOIA coordinator and he would communicate
5 with other FOIA coordinators in the various program offices.

6 We don't know when these other FOIA coordinators
7 dispensed the FOIA request to the relevant people in these
8 other program offices. We only know when Jonathan sent the
9 request to the FOIA coordinator. Those people were his
10 contemporaries. So, all of them, including Jonathan, had the
11 responsibility of dispensing this request to the relevant
12 people. And Jonathan did so --

13 THE COURT: But the administrator and the deputy
14 administrator are both relevant people?

15 MS. GRAHAM-OLIVER: Correct.

16 THE COURT: And no one sent them anything in
17 August.

18 MS. GRAHAM-OLIVER: No one got anything at all.
19 The program administrator -- the program people didn't get the
20 request until October 23rd.

21 THE COURT: Okay.

22 MS. GRAHAM-OLIVER: So the request didn't go out at
23 all until --

24 THE COURT: What happened October 23rd?

25 MS. GRAHAM-OLIVER: Jonathan --

1 THE COURT: The administrator and deputy
2 administrator were excluded October 23rd?

3 MS. GRAHAM-OLIVER: Well, no, Jonathan Newton was a
4 FOIA coordinator. So, Jonathan Newton sent the request on
5 October 23rd to other program coordinators, and those program
6 coordinators then distributed the request to the relevant
7 people in the program which were, in this instance, the
8 administrators and the assistant -- I'm sorry, the assistant
9 administrators and the chief of staff --

10 THE COURT: Right.

11 MS. GRAHAM-OLIVER: -- in the programs. Okay. We
12 don't know when these FOIA coordinators sent that request to
13 the assistant administrators and the chief of staffs in those
14 program offices, but we do know that Jonathan Newton, as the
15 FOIA coordinator in the Office of the Administrator, sent the
16 FOIA request to the administrator and chief administrator --
17 I'm sorry, chief of staff, et cetera, on November 14th, 2012.

18 THE COURT: Some three weeks after he sent it to
19 everybody else?

20 MS. GRAHAM-OLIVER: Yes. Three weeks after he sent
21 it to everyone --

22 THE COURT: Doesn't that still mean they were
23 excluded?

24 MS. GRAHAM-OLIVER: Three weeks after he sent it to
25 his contemporaries.

1 THE COURT: Right.

2 MS. GRAHAM-OLIVER: But we don't know when those
3 contemporaries sent it on to the assistant administrators.

4 THE COURT: Well, anyway, what is the objection?
5 What is going on? Who is it that's objecting to what?

6 MS. GRAHAM-OLIVER: I'm objecting, Your Honor. As
7 you know, this is a FOIA lawsuit, it's concerning documents.
8 And the question that was asked was: During 2012, did you --
9 it was asked to the administrator, the former administrator,
10 Lisa P. Jackson -- did you have occasion to talk with Cass
11 Sunstein or others at OIRA, that's the Office of Information
12 and Regulatory Affairs, as to or about whether rules could be
13 issued by the EPA?

14 And I had an objection to that because it did not
15 apply to any of the -- I didn't think that the limited
16 discovery that you ordered with respect to the use of the
17 e-mail or the exclusion of the administrator, this question
18 was pertinent to those two very direct questions. And I would
19 also object to any issues pertaining -- substantive questions
20 pertaining to rules that the EPA issued during this time,
21 because that's not relevant to what we're here about today.

22 THE COURT: In this round.

23 MS. GRAHAM-OLIVER: In this round, Your Honor.
24 In this round.

25 THE COURT: Once I find that they were initially

1 excluded, you're going to have another round, aren't you?

2 MS. GRAHAM-OLIVER: Looks that way.

3 THE COURT: Okay.

4 MS. GRAHAM-OLIVER: Also --

5 THE COURT: So, what are we doing here now?

6 MS. GRAHAM-OLIVER: Well, we want to clarify
7 exactly the extent and the scope of your two issues that you
8 listed in your Memorandum Opinion, number one, so that we
9 don't have a continued battle in this regard.

10 And, two, Your Honor, I'm glad you said "in this
11 round" because, again, the sufficiency of the search is still
12 at issue.

13 THE COURT: I understand.

14 MS. GRAHAM-OLIVER: Everything is still at issue.
15 And the Government is aware of that as well.

16 THE COURT: Okay. Mr. Coburn.

17 MR. COBURN: Thank you so much, Your Honor. Very
18 briefly. Good afternoon, Your Honor. Barry Coburn for the
19 deponent.

20 THE COURT: Your client says: Just let me out of
21 here.

22 MR. COBURN: I think I heard her say just that,
23 Your Honor. I just wanted to let the Court know that
24 Ms. Jackson has no position with respect to this issue at all.
25 She's not refused to answer any questions. She's here

1 voluntarily. She's agreed to be deposed here as opposed to in
2 California. I just wanted to convey that to the Court.

3 THE COURT: I appreciate that. Mr. Ferguson.

4 MR. FERGENSON: Thank you, Your Honor. There will
5 be occasion for parsing out the different offices. I would
6 ask the Court, if the Court has any questions, to look at
7 Exhibit 1, where Mr. Newton was sending it to the FOIA
8 coordinator for the administrator and the FOIA coordinator for
9 the deputy administrator said: Sorry for the delay. I should
10 have sent this to you originally.

11 And then Exhibit 54. And with the consent of the
12 Government, we have provided a set of exhibits that have been
13 marked for the Court's perusal. And that shows that Nena
14 Shaw, the FOIA coordinator for the deputy, and Mr. Newton,
15 saying: Done anything? Done anything? Done anything?
16 Uh-huh. What am I supposed to do? And she's in another
17 position at the EPA, and she never did it. And it wasn't done
18 until April 30th.

19 So, there was a delay. We want to probe the
20 underlying rationales because, you know, why would they do the
21 delay? Also, the deposition established, Your Honor,
22 something important about Ms. Shaw. No one has filed a
23 complaint against her. No one disciplined her for this or any
24 other purpose.

25 Now, you can say that's the bureaucracy, you don't

1 want to take that on. But there was no administrative
2 proceeding brought against her, no black mark. So the
3 presumption is she was doing exactly what people expected her
4 to do, which was, in the deputy's case, nothing. Now, Your
5 Honor, you're absolutely correct, we can wait and do this in
6 another round. We would propose, and if the Court wants to
7 consider it today, the issue of next steps. We have taken
8 five depositions -- this is the fifth. We would propose --

9 THE COURT: Who did you depose?

10 MR. FERGENSON: We deposed Aaron Dickerson, who was
11 the special assistant to the administrator, and handled her
12 FOIA searches. We deposed Mr. Newton, who was the FOIA
13 coordinator. We deposed Eric Wachter, who was his superior
14 and head of the Executive Office. And at EPA we deposed the
15 then and current deputy, Mr. Perciasepe, who had the most
16 contact with Cass Sunstein, according to all the reports. And
17 we include the reports, Your Honor, because this kind of
18 dispute can be highly charged, and we wanted to make sure that
19 Your Honor knew that we were not fishing and that we were
20 looking at sources that would be considered in the context to
21 be more reliable than not, and a variety of them for this
22 purpose, and Ms. Jackson. We can do it in the second round,
23 but what we would propose to do, whether the Court grants our
24 motion to compel now or not, would be to file the depositions
25 with the Court with what we consider to be serious issues

1 relating to representations made to this Court in filings,
2 which we believe to be materially misleading or inaccurate.

3 And other actions, including two unchanged
4 declarations, where Eric Wachter said that we made -- we
5 decided what was responsive by limiting number two to only
6 those decisions to postpone which were made for political
7 reasons. It appears in both. When we raised this in his
8 deposition, no substitute declaration has been filed before
9 this Court.

10 But we think, Your Honor -- think about it, it was
11 our reason, we thought, that this was being done for political
12 reasons. EPA can't act for partisan political reasons. So
13 what they've done is they've defined out the entire universe
14 of relevant documents. So, we're going to present this to the
15 Court, we're going to present the delays. We're going to
16 present everything we found. We even have an admission by the
17 Court that -- I mean by the Government on the record -- that
18 the administrator texted, using your government phone, for
19 official purposes.

20 And we have admissions from both Mr. Dickerson, and
21 supported by the testimony of the administrator, there was no
22 preservation of any text messages. They were not sent to her
23 secondary account to preserve, so that a search of her
24 secondary account wouldn't find it. And that raises serious
25 issues about the adequacy of the search and when they did the

1 search, Your Honor.

2 When they did the search, as the April 30th date
3 came up and they asked for a postponement, that was the first
4 time that the deputies -- any repository of the deputy's was
5 searched. And even though the general counsel was brought
6 into this at the beginning, the Office of General Counsel, and
7 there's been explanations in Exhibit 1, you'll see it -- we
8 can't give you search terms. Do the best you can. It's too
9 vague.

10 On April 29th when they figured out the documents
11 they received from other offices should have been found in the
12 administrator's search, the Office of General Counsel came up
13 with a search term by the next day -- a string of search
14 terms. That was applied to the administrator's and deputy
15 administrator's account, and it produced a ream of documents.
16 They were reviewed for attorney/client privilege, for
17 responsiveness, for duplication, and produced in two weeks.
18 But that same range of search terms was never applied to any
19 of the other offices or repository searches. Not one.

20 So, by definition, this is an inadequate search.
21 We can do it -- and ask for the Court's guidance in walking us
22 through the steps. We would propose to provide the Court with
23 as clear -- and understanding this is possible with the
24 consent of the Government, we provided you with copies of
25 marked deposition exhibits so far -- pretty much all of them,

1 a few missing -- and outlined what we want to do, and possibly
2 ask for partial summary judgment, and seek a scheduling order
3 to go forward.

4 The text message problem, doing government work on
5 it, and then not kept and not searched. They were never
6 searched, the text messages. We also have a situation where
7 the BlackBerry that the administrator has was turned in to
8 whoever -- the administrator's office -- that, to our
9 knowledge, has never been searched. So, the text messages, as
10 far as we know, only sit on a BlackBerry that doesn't exist,
11 which raises issues of spoliation, which this judge set forth
12 as a possible issue in the footnote in which this Court said
13 in its first order, you know, I had that before, but I see no
14 reason to do it now because the litigation hold order went
15 out. The litigation hold order never applied to the text
16 messages.

17 And we have personal use --

18 THE COURT: I don't know about that.

19 MR. FERGENSON: It didn't. There was nothing --

20 THE COURT: It didn't apply by them.

21 MR. FERGENSON: It didn't apply by them. The
22 litigation hold order notice that went out October 23rd --

23 THE COURT: If you talk to any law firm in town, I
24 think they expect their clients to hold everything.

25 MR. FERGENSON: Yes, they do. And, you know,

1 whether the Office of General Counsel, what they did or didn't
2 do, that, as far as we know is gone, and no effort was to
3 preserve them on a contemporaneous basis. So, we'd like to
4 finish this today. If the Court wants to rule against us,
5 we'll have another round. And --

6 THE COURT: No, I would say in terms of ruling that
7 the question, as presented, under the standard I have could
8 lead to the discovery of discoverable information, and
9 therefore, there's no basis for the client to be instructed
10 not to answer the question. If the question presented as some
11 sort of presidential or deliberate process privilege, or
12 something else, obviously that's going to have to be briefed
13 and argued, but that's not the presentation that was made.

14 The presentation that was made was it's beyond the
15 purview of what they think is relevant discovery. I don't
16 agree. So, I would hold it's within relevant discovery. The
17 witness cannot be instructed not to answer. The witness has
18 to answer. Where we go from there then after this deposition
19 is concluded, I think you all can talk with the Government
20 about how you want to present it to me. I'm willing to set a
21 status conference and talk about what the most efficient way
22 to go forward for the next round is. But clearly from what
23 I've heard today there's going to be another round, so we may
24 as well figure out how to do it most efficiently.

25 MR. FERGENSON: Thank you, Your Honor.

1 THE COURT: All right.

2 MR. FERGENSON: We would certainly be here to have
3 a status conference to work it out most efficiency for both
4 sides and the convenience of the Court.

5 THE COURT: Okay.

6 MS. GRAHAM-OLIVER: Just for clarification sake.
7 If my objection to a particular question has to do with the
8 deliberative process --

9 THE COURT: Right.

10 MS. GRAHAM-OLIVER: -- of privilege, how would you
11 wish that we handle that?

12 THE COURT: Well, you can decide whether to
13 instruct the witness not to answer. They can move to compel
14 orally or in writing, not while she's waiting around on a
15 question like that. Obviously, you're going to have to brief
16 it and argue it, and whoever wins, wins, and whoever loses
17 pays attorney fees and the cost of the witness to come back or
18 whatever. So, you know, how --

19 MS. GRAHAM-OLIVER: Okay. All right. I'm not
20 going to go into the substance of any -- I don't want to
21 answer word for word what plaintiffs' counsel has said here
22 today, I think that is for another day. But, of course, there
23 is -- I think that we have some defenses to what was said here
24 today.

25 THE COURT: I will say to both counsel, right now I

1 have a trial set for June 6th -- June 2nd -- that's going to
2 go for six months. So, to the extent we can move this along
3 before I get bogged down, the better off we'll all be. So,
4 I'm ready, willing and able to set this status as promptly as
5 you all can get together and get this case moving.

6 MR. FERGENSON: Thank you for the hearing and your
7 time.

8 THE COURT: Sure. Thank you all. Thank the
9 administrator -- the former administrator for her patience in
10 going through this process. You can tell her how this works,
11 Mr. Coburn, as well as I can.

12 MR. COBURN: Okay.

13 END OF PROCEEDINGS AT 5:35 P.M.

14 C E R T I F I C A T E

15 I, Lisa M. Foradori, RPR, FCRR, certify that
16 the foregoing is a correct transcript from the record of
17 proceedings in the above-titled matter.

18
19
20 Date:_____

21 Lisa M. Foradori, RPR, FCRR
22
23
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25

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